In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-7

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA
and
HELEN FAYE GENERES,
Real Party in Interest — *Petitioner*

vs.

TITLE INSURANCE AND TRUST COMPANY, et al., — *Respondent*

PETITION FOR A WRIT OF CERTIORARI
to the California Court of Appeal
Third Appellate District

HELEN FAYE GENERES
2538 Waldon Street
Redding, California 96001
Telephone (916) 243-0586
Petitioner.

In the

SUPREME COURT

of the

UNITED STATES

October Term 1976

NO._____

Superior Court in and for the County of Shasta, California and Helen Faye Generes the real party in interest,

Petitioners

vs.

Title Insurance and Trust Company, a California Corporation, and the California Court of Appeal, Third Appellate District,

Respondents

Petitioner prays that a writ of certiorari issue to review the peremptory writ of prohibition by the Court of Appeal of April 6, 1976 prohibiting the Honorable Richard B. Eaton from sitting in Shasta County Superior Court Case No. 45113.

The petition for rehearing was denied, without opinion. The petition for hearing was denied without opinion on March 31, 1976. Appendix "C".

OPINIONS BELOW

The decision of the Shasta County Superior Court is attached as appendix "A"; and the decision of the Court of Appeal as appendix "B"

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

QUESTIONS PRESENTED

Does a Court of Appeal abuse its discretion in issuing a peremptory writ prohibiting the trial court judge from sitting in the case when defendant TI&T's dissatisfaction stems as a result of the trial court's adverse ruling from the facts learned in participation in the case within the four corners of the courtroom?

Is it not a denial of due process and equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States for the Court of Appeal to reverse the trial court judgment in favor of petitioner for $20,000. against TI&T and permit TI&T to use a disqualification motion as a substitute for appeal gambling to obtain a favorable decision by another judge?

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fifth and Fourteenth Amendments of the United States Constitution.

Constitution of the United States, Amendment XIV:

"..no State shall make or enforce any law which shall abridge the privileges of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case involves the following statutes of California:

California Code of Civil Procedure 170.6

pertinent parts..."..any party to or any attorney may establish by affidavit under penalty of perjury that the judge before whom the proceedings are pending is prejudiced against such party or attorney so that such party or attorney believes that he cannot have a fair and impartial trial before said judge or court.."

In the case at bar, it was defendant-respondents that scheduled the cases before the Honorable Richard B. Eaton, the judge they claim now is prejudiced against their interests because he ruled against them.

California Code of Civil Procedure Section 283:

"An attorney shall have authority to bind his client in any steps of an action by his agreement filed with the clerk or entered upon the minutes of the Court and not otherwise."

California Code of Civil Procedure 412.20 (4).

"Provides for entry of default if complaint

is not answered in thirty days.

STATEMENT OF THE CASE: the facts

In May 1970 Title Insurance and Trust[1/] closed an escrow. The complaint was served on TI&T in September 1972. Petitioner on October 24, 1972 by certified letter expressly provided for no extensions to answer the complaint. The return receipt was made a part of the affidavit to the trial court. TI&T by its letter of October 16, 1972 had indicated they intended to answer in the very near future. The trial court ruled that the very near future may mean ten to thirty days but it did not mean "forever". TI&T were well aware of petitioner opposition to its failure to answer her complaint. Petitioner took the default of TI&T in February 1975, over 15 months later. Petitioner had 54 days prior demanded an answer from TI&T attorneys. TI&T protested the entry of default and scheduled its motions to set aside the default before the Honorable Judge Eaton, the very judge they now claim is prejudiced against them. TI&T argued to the court as quoted from the reporter's transcript set forth in petitioner-respondent's brief in the Court of Appeal filed Aug. 13, 1974, on page 6. "I would like to respond to the comment she made about the delays that are involved. We are the defendants in the litigation and we have obviously no desire to prosecute the action any more rapidly than absolutely necessary. The trial court denied TI&T's motions, without prejudice to a renewed motion to determine if TI&T had a good defense. Judge Eaton resolved the conflicts in the affidavits of the parties and ruled TI&T did not have a good defense or a good excuse for its default. The case went to trial. The judgment was entered in favor of petitioner-plaintiff against TI&T for $20,000.

1./ Title Insurance and Trust Company is hereafter referred to as TI&T.

TI&T had admitted secondary liability. TI&T deleted 53 acres from the descriptions in the trust deeds that were to represent the security for the $20,000. in notes. The land described in the trust deeds were lost in foreclosure to prior obligation leaving the security for the notes "valueless".

> "A party is not required to exhaust its claim against the primary obligator before resorting to the liability of the title insurance company."

Howe vs. City Title Insurance. (1967) 255 CA2d 85-97 [headnotes 1-2-3-4]
Stephan vs. Title Insur. & Trust Co. 225 CA2d 671-673

The Court of Appeal reversed on appeal ruling TI&T proposed answer accompanying its motion to vacate the default was sufficient; in spite of the fact that over 15 months had expired and the trial court had determined TI&T had neither a good excuse or a good defense. TI&T filed its memorandum of costs of approximately $2000. in the trial court; and later its motion to disqualify Judge Eaton.

> Quote: The Hon. Judge Eaton is prejudiced against TI&T so that declarant believes he cannot have a fair and impartial trial before said judge."
> /s/ Atty. Wells."

Judge Eaton ruled that inasmuch as the Court had heretofore determined an issue of fact the motion would be disregarded. Appendix "A".

The Court of Appeal reversed and issued its peremptory writ April 6, 1976 prohibiting Judge Eaton from sitting in the case. Appendix "B".

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEAL WAS ARBITRARY, CAPRICIOUS, AND ABUSED ITS DISCRETION AND ITS DECISION IS CONTRARY AND IN CONFLICT WITH BOTH STATE AND FEDERAL LAW AND VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION.

"The law"

> "It is well established that it is within the discretion of the trial court to determine whether or not to grant a motion to vacate a default and absent a clear abuse of discretion the court's ruling should not be overturned."

(1975) Northridge Financial Corp. vs. Arthur E. Hamblin 48 CA3d 822 [1]

citing Transit Ads. Inc. vs. Tanner Motor Livery Ltd. 270 CA2d 275 (1969) [1]

> "Before the trial court can be called to exercise its discretion in relieving from a default judgment, the party in default must show not only a good excuse but also a meritorious defense to the action; it must appear prima facie that a different result would be reached if the default was set aside; and a party must accompany his notice with an affidavit of merits or verified pleading which sets up a valid defense."

TI&T did not set up a valid defense. The trial court's determination was correct.

In Pulaski vs. Abbey Cont. (1969) 268 CA2d 883 the court held the trial court was within its discretion in determining that a showing of a meritorious defense had not been made.

"The conflicting evidence rule does not permit weighing of the evidence or reversal of the judgment."

Waller vs. Brooks (1969) 267 CA2d 389
[Headnotes 2, 3, 4, 6, & 7.]

"A reversal on appeal does not disqualify a judge nor is it evidence of bias or prejudice."

People vs. Keller (1966)
54 Cal. Rptr. 154

There was no record of the disqualification hearing and reporters were not present at all the prior hearings in the case.

The court said in Thomlinson vs. Superior Court (1944) 66 CA2d 640 that where there was no record of the disqualification hearing, it must be assummed the evidence supported the trial court.

THE CASES CITED BY THE COURT OF APPEAL TO DISQUALIFY JUDGE RICHARD B. EATON ARE IRRELEVANT AND NOT APPLICABLE AS THEY DO NOT FIT THE FACTS IN THE CASE AT BAR.

In the Kohn vs. Superior Court (1966) 239 CA2d 428 defendants had been indicted by the grand jury. The judge did not indict the defendants. The judge in that case could not have determined a question of fact. The case is clearly inapplicable.

In the Eagle Maintenance and Supply Co. vs. Superior Court (1961) 196 CA2d 692. The judgment was never entered. In the case at bar the judgment was not only entered but it was finalized and an appeal taken from it. Therefore, the motion was no longer proper.

The Goodenough vs. Superior Court case cited by the Court of Appeal (1971) 18 CA 3d 692, 697 merely said a peremptory writ may be issued without issuance of an alternative writ where there is no other adequate remedy. TI&T in the case at bar has an adequate remedy by appeal. The Court said in Bumpus v. Uniroyal 385 F. Supp. 711 (1974) that a motion for disqualification was never meant to be a substitute for appeal.

THE DECISION OF THE COURT OF APPEAL IS CONTRARY AND IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS AND VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

The federal question was raised in plaintiff-petitioner's petition for hearing at page 42 quote:

"The Court of Appeal denied both state and federal constitutional rights. See Article I, Section 7, and Article VI of the Constitution of the State of California, and the Fourteenth Amendment of the Constitution of the United States...." and the Fourteenth Amendment was set forth ver batim in the petition with emphasis on the denial of equal protection of the laws.

The California courts denied the federal question without comment.

The Court said in People vs. Tappen
266 CA2d at 813

"The defendants failure to challenge a judge under Section 170.6 prior to appeal is a strong indication that the contention has no merit."

In Oliver vs. Michigan State Bar of Education 508 F2d 178 [8] ruled where the motion is not made until the judgment was entered; and the Court had invested substantial judicial time there was no just cause to disqualify the judge."

In the case at bar defendants TI&T scheduled its motions before Judge Eaton- the very judge they now claim is biased against them. The Court said in People vs. Barnfield (1975) CA2d Criminal 26261 "..once a judgment is rendered the same time span in the judicial process has been covered as is covered by a trial on the merits and a motion pursuant to 170.6 is no longer proper."

The Court said in BUMPUS v. UNIROYAL TIRE DIVISION OF UNIROYAL INC. 385 F. Supp. 711 (1974) [2,6,8]

"Attorneys affidavit insufficient to meet statutory requirement. To demonstrate necessary kind of bias sufficient to require judge to recuse himself, affidavit must set forth more than adverse rulings since statute authorizing disqualification was never meant to be a substitute for an appeal." "To be sufficient affidavit must give fair support of a bent of mind that may prevent or impede impartiality. Chief Justice Sircia in U. S. vs. Mitchel 377 F. Supp. 1312, 1316-1317 (1974 discussed in Watergate, citing Federal Facilities Realty Trust 140 F. Supp. 522 "The alleged bias and prejudice to be disqualifying must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States vs. Grinnel Corp. 384 U. S. 563, 583.

S U M M A R Y

TI&T is the largest title insurance company in the business; and, daily it handles the life savings of thousands of the public. It should not be permitted to escape its obligations by making a mockery of the judicial system with its unlimited resources and legal talents.

Petitioner has been greatly damaged by the delay in excess of six years. It shocks the conscience. If TI&T is permitted to disqualify Judge Eaton, it will be possible for TI&T to disqualify each succeeding judge until TI&T obtains a favorable decision.

The Court of Appeal decision deprives the public of equal protection of the laws under both the State and Federal Constitutions. TI&T were original parties to the lawsuit. It was TI&T that scheduled its motions before Judge Eaton. TI&T dissatisfaction of Judge Eaton is the result of his adverse ruling which Judge Eaton made from the facts he learned in participation in the case and not from any extra judicial source. TI&T have no grounds to disqualify Judge Eaton from sitting in the case.

C O N C L U S I O N

The writ of certiorari should issue. This court should follow its own precedents as the trial court did; and, squash the Court of Appeal's peremptory writ prohibiting Judge Eaton from sitting in the case; and, affirm the trial court's judgment that awarded petitioner the $20,000. against Title Insurance and Trust Company.

Respectfully submitted,

HELEN FAYE GENERES

APPENDIX

Appendix "A"

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA Dept. I

Minute Book 105 #45113
Page 438
Dec. 9, 1975

HELEN FAYE GENERES, Plaintiff]
vs.]
HAROLD A. BURSELL, et al., Defendants]

NATURE OF PROCEEDINGS:

MOTION IN OPPOSITION TO PEREMPTORY DISQUALIFICATION OF JUDGE EATON

Plaintiff Helen Faye Generes appearing in propria persona, and J. M. Wells, Jr., attorney, appearing on behalf of defendant Title Insurance & Trust Company, the above matter comes on for hearing. Defendants Bursell are not present in person or by counsel.

The Court states that inasmuch as it has heretofore determined an issue of fact, the 170.6 C.C.P. Disqualification will be disregarded.

The Court further states that a Remittitur was received on December 2, 1975, stating "The order is reversed and the cause remanded to the trial court with a direction to set aside the default and default judgment against Title Insurance and Trust Company.

IT IS SO ORDERED. Let the case go forward in due course of law.

/s/ RICHARD B. EATON - Judge.

Appendix "B"

COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

Title Insurance and Trust Company, A California Corporation,

Petitioner

vs.

SUPERIOR COURT IN AND FOR THE COUNTY OF SHASTA

Respondent

HELEN FAYE GENERES

Real Party in Interest

3 Civil 15673 Shasta No. 45113

PEREMPTORY WRIT OF PROHIBITION

TO THE SUPERIOR COURT FOR THE COUNTY OF SHASTA, AND HONORABLE RICHARD B. EATON, JUDGE, Respondents, and HELEN FAYE GENERES, Real Party in Interest:

You are hereby directed forthwith to comply with the directions of the attached opinion or order of this court which has now become final.

WITNESS THE HONORABLE ROBERT K. PUGLIA, Presiding Justice of the Court of Appeal of the State of California, in and for the Third Appellate District.

Attest my hand and the seal of the court this 6th day of April 1976.

WILFRIED J. KRAMER, Clerk
By Mary Louise King,
Deputy

BY THE COURT:

Petition seeks a writ of prohibition restraining Judge Richard B. Eaton of respondent court from hearing further proceedings in the instant case.

Petitioner, who suffered a default judgment in this case appeared befor Judge Eaton and moved to set aside the default under Code of Civil Procedure 473. The motion was denied, but this court subsequently reversed the order of denial and set aside the default. On remand, prior to the hearing of further proceedings, petitioner moved to disqualify Judge Eaton under code of civil procedure 170.6 which he diened on the ground that he had previously determined an issue of fact.

A motion to disqualify a judge under code of civil procedure 170.6 may be made after any hearing or proceeding held prior to trial, including a hearing on a motion to set aside a default judgment, which does not involve a determination of a contested fact issue relating to the merits of the case. (Kohn v. Superior Court (1966) 239 Cal. App. 2d 428, 430; Eagle Maintenance & Supply Co. vs. Superior Court (1961) 196 Cal. App. 2d 692). Since this determination was not on the merits, the motion to disqualify was not untimely and its denial was error.

The real party having appeared and due notice having been given to respondent court, this court is empowered to issue a peremptory writ without prior issuance of an alternative writ. (Code of Civil Procedure §§1088, 1105; cf. Goodenough v. Superior Court (1971) 18 Cal. App. 3d 692, 697.)

Let a peremptory writ of prohibition issue prohibiting respondent court from hearing proceedings in the instant case until Judge Eaton is removed and another judge assigned.

FOR THE COURT:

PUGLIA P. J.

JANES J.

Appendix "C"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAR 31 1976

I have this day filed Order

HEARING DENIED

In re: 3 Civ. *No.* 15673

Title Insurance and Trust Company

vs.

Superior Court, Shasta

Respectfully,

G. E. BISHEL
Clerk

39325-877 11-75 3M OSP

V E R I F I C A T I O N

Helen Faye Generes, being first duly sworn states that she has read the foregoing document and understands it; and that it is true and correct to the best of her knowledge and belief.

State of California _____
County of Shasta
Helen Faye Generes, being first duly sworn, did appear before me this ___day of June 1976 and did sign the foregoing instrument in my presence. My commission expires_____.

_____
NOTARY PUBLIC

The undersigned under penalty of perjury declares that she is a citizen of the United States and a resident of the County of Shasta, over the age of eighteen years, and not a party to the above entitled action, with a business address of 1708 Placer St. Redding, Ca.; and that there is delivery service to the United States Mail to each place addressed; and that she executed this certificate on this day and served a true copy of the foregoing document by placing same in an envelope fully prepaying postage thereon and depositing said envelope in the United States Mail Post Office Box at Redding, Ca. on____day of June 1976 addressed as follows: Lopez, Kennedy & Srite P. O. Box 1826, Redding, Ca. 96001.
Court of Appeal, Library & Courts Bldg. Sacramento, California 96001
Shasta County Superior Court -1500 Court Street, Courthouse, Redding, California 96001.
Hon. Judge Eaton, Dept. I, Courthouse, 1500 Court Street, Redding, California 96001.
All parties required to be served have been served.
I declare under penalty of perjury the above is true and correct. Dated: June____1976.Redding,Ca.

_____
Lenora Smith

IN THE SUPREME COURT

OF THE

United States

OCTOBER TERM, 1976

No. 76-7

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA

and

HELEN FAYE GENERES,
Real Party in Interest — *Petitioner*

vs.

TITLE INSURANCE AND TRUST COMPANY, et al., — *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
to the California Court of Appeal
Third Appellate District

MEMORANDUM FOR RESPONDENT IN OPPOSITION

JOHN F. FORWARD
433 S. Spring Street
Los Angeles, California 90013

in association with

WELLS AND WINGATE
1290 West Street
Redding, California 96001

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1976

No. 76-7

Superior Court of the State of California
for the County of Shasta

and

HELEN FAYE GENERES,

Real Party in Interest Petitioner

vs.

TITLE INSURANCE AND TRUST COMPANY, et al.,

Respondent

ON PETITION for WRIT of CERTIORARI

to the California Court of Appeal

Third Appellate District

MEMORANDUM FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

This is an action filed by Petitioner seeking to collect a real estate commission allegedly due her. After Respondent had obtained

an open extention of time to answer the complaint from the attorney representing Petitioner, the Petitioner discharged that attorney and proceeded to take Respondent's Default Without Notice. Respondent timely moved to set aside the default, which motion was denied by the Honorable Richard B. Eaton, as was a renewal of the Motion, and a Default Judgment was entered against the Respondent. Respondent appealed the decision denying the motion to set aside the default to the Court of Appeals of the State of California, in and for the Third Appellate District, and on December 1, 1975, a remittitur was issued to the Superior Court of Shasta County, State of California, reversing the Order and directing that the Default and Default Judgment against Respondent be set aside. On December 4, 1975, prior to the hearing of further proceedings in the case. Respondent filed a Disqualification of Judge Eaton under California Code of Civil Procedure, Section 170.6, which motion was granted. On December 8, 1975, Petitioner filed a Motion in Opposition to the Disqualification. On December 9, 1975, Judge Eaton, on hearing of said Motion in Opposition to the Disqualification, ruled that his disqualification by Respondent would be disregarded. On or about January 16, 1976, Respondent filed a Petition for Writ of Prohibition with the Court of Appeals for the Third Appellate District and, on April 6, 1976, a Peremptory Writ of Prohibition was issued by said Court prohibiting Judge Eaton from hearing any further matters in connection with this case. On March 31, 1976, Petitioner's Petition for Hearing was denied by the Supreme Court of the State of California.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The only constitutional or statutory provisions relevant to decision of this case

is 28 U.S.C. §1257(3), which provides that final judgments or decrees rendered by the highest Court of a state, in which a decision could be had may be reviewed by the Supreme Court, "by Writ of Certiorari where the validity of a treaty or of a statute of the United States is drawn in question or when the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties and laws of the United States or where any title, right, privilege or immunity especially set up or claimed under the Constitution, treaties or statutes of or commissions held or authority exercised under the United States".

JURISDICTION

Petitioner asserts that this Court has jurisdiction to review the decisions of the Court of Appeals and of the State Supreme Court granting a Writ of Prohibition, prohibiting Judge Eaton from hearing any further matters connected with this case by virtue of the provisions of 28 U.S.C. §1257(3). Petitioner bases her contention on the grounds that the decisions violated the Fifth and Fourteenth Ammendments of the United States Constitution. However, she fails to support this claim with any argument or authority. A general statement that a decision is violative of the Constitutional rights of a party or against the Fourteenth Ammendment, or that it is violative of due process, appearing only as a specification of error will not raise a Federal question. Clark vs. McDade, 165 U.S. 168, 17 S.Ct. 284, (1897). Similarly, this Court has previously held that it did not have jurisdiction to review the decision of a State Court where the records failed to disclose that the alleged Federal question was decided by the State Court or that the judgment of the State Court necessarily involved the Federal right and decided it

adversly to the petitioning party. Chesapeake and Ohio Railway Company vs. McDonald, 214 U.S. 191, (1909). Petitioner's claim that her Constitutional rights have been violated by the Court of Appeals and the State Supreme Court is simply an attempt on her part to have well-settled questions of state law reviewed for the third time.

CONCLUSION

As the Petition fails to demonstrate that there is any substantial Federal question involved in this case, the Petition should be dismissed for lack of jurisdiction.

Respectfully submitted,

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in association with

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Attorneys for Respondent

By _____
J. M. Wells, Jr.